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EXAMINER

KIDWELL, MICHELE M

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

GROUP 3700

Paper No. 20

Application Number: 09/653,012
Filing Date: September 01, 2000
Appellant(s): KREUTZ ET AL.

Matthew P. Fitzpatrick
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed August 27, 2003

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(1) Real Party in Interest

A statement identifying the real party in interest is contained in the brief.

(3) Status of Claims

The statement of the status of the claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Invention

The summary of invention contained in the brief is correct.

(6) Issues

The appellant's statement of the issues in the brief is correct.

(7) Grouping of Claims

Appellant's brief includes a statement that claims 1 – 20 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

5,986,165	MODER et al.	11-1999
6,164,442	STRAVITZ	12-2000
5,988,386	MORROW	11-1999

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

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Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1 – 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Moder (US 5,986,165).

With reference to claim 1, Moder et al. (hereinafter "Moder") discloses a feminine hygiene kit comprising an absorbent tampon (14), said tampon comprising an absorbent core and a withdrawal mechanism attached thereto (col. 9, line 54 to col. 10, line 24 and figure 4) and a backup feminine protection product (12) wherein the tampon and the backup feminine protection product are packaged in a common package as set forth in col. 6, lines 47 – 55.

The difference between Moder and claim 1 is the provision that the absorbent core has a synergistic absorbent capacity of less than 6 grams.

It would have been obvious to one of ordinary skill in the art to modify the kit of Moder by providing an absorbent tampon having an absorbent core with a synergistic absorbent capacity of less than 6 grams because Moder discloses the use of three of the four absorbencies designated by the FDA in his patent and states that depending upon the desired absorbency one desires in the finished tampon, the basis weight of the absorbent ribbon can vary as set forth in col. 20, lines 1 – 13. Therefore, it would only require ordinary skill in the art to provide a lighter absorbency, i.e. the use of a junior

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tampon – the forth absorbency designated by the FDA, if desired. Likewise, since Moder discloses a “regular” absorbency, a “super” absorbency and a “super-plus” absorbency, it shows that Moder recognizes the advantages of making different absorbencies available in the kit for use based on the desire of the consumer. Therefore, it would have been obvious to include a “junior” absorbency, if desired, in the same type of kit disclosed by Moder.

Regarding claim 2, Moder discloses a feminine hygiene kit wherein the backup feminine protection product is a pantiliner as set forth in col. 6, lines 24 – 26.

As to claim 3, Moder discloses a feminine hygiene kit wherein the pantiliner has a caliper of less than or equal to about 3 mm as set forth in col. 7, lines 40 – 41.

With reference to claim 4, Moder discloses a feminine hygiene kit wherein the backup feminine protection produce is a sanitary napkin as set forth in col. 8, lines 44 – 48.

With respect to claim 5, Moder discloses a feminine hygiene kit wherein the backup feminine protection product is an absorbent interlabial device as set forth in col. 3, lines 5 – 9.

Claims 1, 6, 8 – 9 and 14 – 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Stravitz (US 6,164,442).

With reference to claim 1, Stravitz discloses a feminine hygiene kit comprising an absorbent tampon and a backup feminine protection product wherein the tampon and the backup feminine protection product are packaged in a common package as set forth in col. 6, lines 8 – 38.

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The difference between Stravitz and claim 1 is the provision that tampon have a withdrawal mechanism attached thereto and that the absorbent core have a synergistic absorbent capacity of less than 6 grams.

Stravitz does not explicitly state that the tampon provided in the kit has a withdrawal mechanism attached thereto. However, it is well known in the art that the basic structure of a tampon includes a withdrawal mechanism attached thereto. Additionally, Moder provides a tampon with a withdrawal mechanism attached thereto.

It would have been obvious to one of ordinary skill in the art to modify the tampon of Stravitz by providing a withdrawal mechanism because the withdrawal string will provide a safe and reliable means by which the tampon can be withdrawn from a woman's vagina after it has absorbed a certain amount of menstrual fluid as taught by Moder in col. 19, lines 34 – 39.

Moder also provides an absorbent tampon having an absorbent core with a synergistic absorbent capacity of from 6 grams to over 12 grams.

It would have been obvious to one of ordinary skill in the art to modify the tampon of Stravitz to provide a tampon with a synergistic absorbent capacity of less than 6 grams because Moder discloses the use of three of the four absorbencies designated by the FDA in his patent and states that depending upon the desired absorbency one desires in the finished tampon, the basis weight of the absorbent ribbon can vary as set forth in col. 20, lines 1 – 13. Therefore, it would only require ordinary skill in the art to provide a lighter absorbency, i.e. the use of a junior tampon – the fourth absorbency designated by the FDA, if desired. Likewise, since Moder discloses a “regular” absorbency, a “super”

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absorbency and a "super-plus" absorbency, it shows that Moder recognizes the advantages of making different absorbencies available in the kit for use based on the desire of the consumer.

Further, the applicant states on page 10 of the specification that the use of a tampon having an absorbency in the range of less than or equal to about 6 grams offers several advantages in the learner's kit of the claimed invention. This statement provides support for the reasoning that the regular absorbency tampon will function equally as well as a junior absorbency tampon and that substituting a junior absorbency tampon for a regular absorbency tampon would only require ordinary skill in the art.

Regarding claim 6, Stravitz provides a feminine hygiene kit comprising a tampon a backup feminine protection product and a mirror packaged together in a common package as set forth in col. 6, lines 8 – 32.

With respect to claims 8 and 19 – 20, it is well known in the art to package a tampon with a tampon insertion guide and/or instruction booklet which would thereby assist the user in creating a tampon usage system, in order to provide the user with personal assistance and necessary guidelines associated with using the product.

It would have been obvious to one of ordinary skill in the art to modify the feminine hygiene kit of Stravitz to include such guides and/or instructions to provide assistance to users that are not familiar with tampon usage.

With reference to claims 9 and 14 – 18, it would have been obvious to one of ordinary skill in the art to modify the feminine hygiene kit of Stravitz to employ any and/or all of the claimed limitations based on the targeted population because the

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purpose of the kit in general is to provide convenience to the user. Likewise, Stravitz discloses that a space is provided in the kit to accommodate additional items or articles as desired as set forth in col. 6, lines 13 – 15.

Claims 10 – 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Stravitz, as applied to claims 1 and 6 and further in view of Morrow (US 5,988,386).

The difference between Stravitz and claim 10 is the provision that the feminine hygiene kit further comprises an insertion glove.

Morrow teaches a feminine hygiene kit further comprises a glove as set forth in col. 11, lines 41 – 43.

It would have been obvious to one of ordinary skill in the art to modify the feminine hygiene kit of Stravitz to include a glove because the glove allows the woman's hand to remain sanitary while inserting/removing the tampon as taught by Morrow in col. 11, lines 50 – 52. While the glove of Morrow is explicitly disclosed as a removal glove, the glove remains fully capable of being used as an insertion glove and serves the same purpose as the insertion glove.

Regarding claims 11 – 13, Morrow teaches the claimed limitations as set forth in col. 11, lines 33 – 58.

(11) *Response to Argument*

Applicant's arguments filed August 27, 2003 have been fully considered but they are not persuasive.

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Initially, the applicant argues that the Moder et al. patent does not teach or suggest the desirability of substituting the higher absorbency tampon disclosed with a tampon having a synergistic capacity of less than 6 grams. The examiner disagrees with this assertion and refers to col. 20, lines 1 – 13 of the reference. This passage discloses that the basis weight of the absorbent ribbon can vary depending upon the desired absorbency of the finished tampon. The Moder reference uses a “carding” process to manufacture the tampon based on the desired absorbency (col. 19, line 66 to col. 20, line 4). The width of the absorbent ribbon for each intended absorbency falls within an approximate range (col. 20, lines 6 – 16) and will include some variances as all manufacturing processes do. The width for a “regular” size tampon, for example, is about 50 mm (col. 20, lines 10 – 11), indicating that the width may be 51mm or 49mm and therefore allow for some deviation in the absorbency of the tampon. The intended absorbency of the regular tampon disclosed by Moder may be 6g, but the actual absorbency may be 6.01g or 5.99 g due to the variances in the manufacturing process. The examiner contends that Moder (1) establishes the variance in the absorbent ribbon that is directly correlated with the absorbency of the product and (2) recognizes the availability of different sized tampons in the industry (col. 19, lines 23 – 25), thereby rendering a finished product with an absorbency of less than 6 grams within the level of ordinary skill in the art.

Therefore, it would have been obvious to one of ordinary skill in the art to modify the basis weight of the disclosed tampons (i.e., the sizes disclosed as “regular”, “super” and “super-plus) to provide a finished product having the claimed absorbency since it

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has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art.

In reply to the applicant's argument that the FDA recognizes 6 categories of tampon absorbency and not 4, the examiner would like to add that these absorbencies have not always been recognized by the FDA. There were originally 4 absorbencies disclosed with 2 – 3 being added at a later time as noted by the applicant. The "traditional" absorbency terms are "regular", "super" and "super-plus." The remaining three absorbencies were added at a later date in order to make the tampon absorbency, that initially varied from brand to brand, correlate throughout the industry.

Previously, the examiner asserted that "the applicant states on page 10 of the specification that the use of a tampon having an absorbency in the range of less than or equal to about 6 grams offers several advantages in the learner's kit of the claimed invention. This statement provides support for the reasoning that the regular absorbency tampon will function equally as well as a junior absorbency tampon and that substituting a junior absorbency tampon for a regular absorbency tampon would only require ordinary skill in the art." The applicant responds by stating that according to the cited "evidence", that has been revised as of April 2002, teaches the "regular" absorbency to be greater than 6 grams. The examiner maintains her position in that even if the regular absorbency is found to be greater than 6 grams, 6.01 grams is still **about** 6 grams and would still function equally as well as a junior absorbency tampon according to the applicant's specification.

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Furthermore, the applicant relies on the advantages associated with using a tampon having an absorbency of less than 6 grams in a learner's kit of the claimed invention. The specification states, among other things, that the use of a lower absorbency tampon feels more comfortable, eases removal, etc. It is noteworthy to add that a lower absorbency tampon is not limited to use for teens and vice versa. In fact, the term "junior" absorbency has been changed to "lite" absorbency to avoid such confusion. A lower absorbency tampon is suitable for just that.....a light flow. Just because a consumer may be younger or a novice using the claimed invention does not mean that the consumer will have a light flow. The Moder reference recognizes the combination of a tampon having all of the traditional absorbencies in combination with a backup absorbent article for added protection. For one of ordinary skill in the art to modify the traditional absorbency ranges to include absorbency ranges that fall within +/- 1 gram on either end of the ranges already disclosed, in combination with the fact that the Moder reference explicitly teaches that the absorbency of the disclosed tampon may be varied depending upon the desired finished product, would be an obvious modification motivated by the reference and the proposals and/or revisions made to the Code of Federal Regulations provided by the FDA.

With respect to claim 5, the applicant argues that Moder does not disclose the backup feminine product as an interlabial product. The examiner refers to col. 3, lines 5 – 9, where Moder states that the article of the present invention includes a vaginal insert device and a "...shield configured to fit the pudendal region of a woman...". The term "interlabial" is known to refer to the space in the pudendal region of the female

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anatomy which is located between the inside surfaces of the labia majora extending into the vestibule.

Regarding the applicant's argument that there is nothing cited in the Stravitz or Moder reference which suggests the desirability of providing a tampon having an absorbent capacity of less than 6 grams, the examiner refers to the preceding arguments that Moder (1) establishes the variance in the absorbent ribbon that is directly correlated with the absorbency of the product and (2) recognizes the availability of different sized tampons in the industry (col. 19, lines 23 – 25), thereby rendering a finished product with an absorbency of less than 6 grams within the level of ordinary skill in the art.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., a device used to help "guide" the physical insertion of a tampon and a "reward" to promote positive reinforcement while first trying tampons) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Additionally, the examiner contends that it would have been obvious to one of ordinary skill in the art to package a tampon insertion guide with the kit since it is well known in the art that tampons are normally packaged with user instructions (i.e., the user is shown how to prepare the tampon for use and how to discard it after use) and

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guidelines that provide direction on how to use the product (i.e., proper method of insertion and removal).

With respect to the applicant's argument that Stravitz does not teach items that may be included in the kit to provide the user with a "reward", the examiner disagrees. Stravitz teaches that multiple items may also be included in the kit such as food and drinks (col. 13, lines 24 – 25), paintbrushes and water color packets (col. 13, line 67), a checkbook, notebook or diary (col. 9, line 13) and a host of other products, all of which may be considered a "bonus product offering". The substitution of one bonus product offering for another requires only a level of ordinary skill in the art since the general condition has been disclosed in the prior art and the motivation would be the convenience of having desired products packaged together based on the targeted population.

For the above reasons, it is believed that the rejections should be sustained.

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Respectfully submitted,

Michele Kidwell

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December 11, 2003

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